A similar analysis applies when the program is designed to promote residential diversity by increasing Whites' opportunities to learn of and seek housing. In South Suburban, the plaintiff was a non-profit corporation formed to promote and encourage multi-racial communities. It was engaged in a program of "affirmative marketing" of real estate, which consisted of race-conscious efforts to promote integration or prevent segregation, through special marketing or real estate to attract persons of particular racial classifications who were not likely to either be aware of the availability or express an interest in the real estate without special efforts. The outreach plan adopted by plaintiff required "best efforts to attract minority and majority group persons", placing advertisements in newspapers calculated to reach an audience of [the other race] and distribution of information to "selected" [organizations] and employers designed to reach [the other race]. The plan also required brokers to keep a record of the race of the persons shown a home. Id., 935 F.2d at 873.

The court held that the program did not violate the Fair Housing Act. The affirmative marketing plan in no way deterred Blacks from applying despite the fact that it directed the information to predominately White audiences. It "merely create[d] additional competition in the housing market" and involved "no

lessening of efforts to attract black home buyers".134/

The rational basis standard, as applied in the housing context in Raso and South Suburban, also applies in the employment context. In Duffy v. Wolle, 123 F.3d 1026 (8th Cir. 1997), a White male had alleged "reverse discrimination," when he was passed over for a courthouse job in favor of a White female. Id. at 1029. Among other things, the plaintiff pointed to statements by an employee in the court administrative office conducting the search, seeking to recruit a female for the position, and to the fact that two members of the panel of judges making the selection had usually hired females as law clerks. Id. at 1037.135/ While the court

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134/ Id. at 884. The court stated:

> we are of the opinion that the [marketing plan] also advances the purpose of the Act through making housing equally available to all by stimulating interest among a broader range of buyers. Furthermore, this marketing may simply be a wise business move in that it stimulates interest in housing among new and/or potential customers.

Id.

135/ This cases illustrate the dangers of overzealous accusations of discriminatory intent derived from innocent and well intentioned statements to the effect that an employer seeks, tries to hire, or would like to hire minorities or women. On December 10, during a meeting with Washington, D.C. area high school students televised live on C-SPAN 2, Justice O'Connor stated:

> I've had clerks of different races. I have had black clerks, I have had Asian clerks, I have had Hispanic clerks, I've had Indian-Americans, Latvian Americans, Ukrainian Americans. You name it, I've had them and I try to hire a great many female clerks (emphasis supplied).

"High Court Takes Heat as Employer", Fair Employment Report, December 16, 1998, at 185. Obviously, this was an innocent and well intentioned statement. Yet if Duffy had been decided differently, male law clerk applicants rejected by Justice O'Connor could successfully sue her for discrimination.

found the plaintiff had made a prima facie case under Title VII, the defendants offered credible evidence rebutting the claim, namely the solid, comparable qualifications of the person selected. It was then incumbent upon the plaintiff to show that their reasons were pretextual. Id. at 1038. The plaintiff showed that the administrative office's desire that the panel of judges would "advertise the...position in a publication of national circulation to reach all persons who might be interested so [the panel] could have an open, nationwide, diverse pool of qualified applicants" did not establish pretext. The court ruled that "[a]n employer's affirmative efforts to recruit minority and female applicants does not constitute discrimination." Id. at 1038-39, citing Shuford and Peightal. As the court explained, an inclusive recruitment effort enables employers to generate the largest pool of qualified applicants, and it helps to ensure that minorities and women are not discriminatorily excluded from employment. Id. at 1039. Moreover, inclusive recruitment creates no adverse impact on those who had traditionally been included in the applicant pool. "The only harm to white males is that they must compete against a larger pool of qualified applicants. This, of course, "is not an appropriate objection."136/

136/ Id. Compare Monterey Mechanical Co. v. Wilson, 125 F.3d 702 (9th Cir. 1997) ("Monterey Mechanical"), where a court struck down a state statute which required general contractors to subcontract a specific percentage of the work to minority, women, and disabled veteran owned subcontractors, or having failed to so subcontract, in the alternative, to demonstrate "good faith" efforts to do so. Id. at 704. The good faith efforts showing was specific, including making contact with the awarding department to identity minority, women and disabled veteran business enterprises;

[n. 136 continued on p. 80]

Other courts have held that measures that involve presentations at job fairs and career days designed specifically to apprise minorities of career opportunities[137/] and encouraging the provision of equal opportunity through the expansion of the applicant pool and not at the point of the hiring decision, are

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136/ [continued from p. 79]

making contact with other state and federal agencies, and with local minority, women and disabled veteran business enterprise organizations to identify minority women, veteran business enterprises; advertising in trade papers and papers focusing on minority, women, and veteran business enterprises; submitting invitations to bid to potential minority, women, and veteran contractors; and considering available minority, women, and veteran business enterprises. Id. at 710. The "good faith" efforts were required to be documented. Id. at 710. The court ruled that this was not a non-discriminatory outreach program, which could have merely required that advertisements for bids be distributed in such a manner as to assure that all persons, including women-owned and minority-owned firms, have a fair opportunity to bid, because it treated contractors differently according to their ethnicity and sex with respect to the "good faith" requirement. The statute required bid solicitation in the context of requiring "good faith efforts" to meet the percentage goals, required the distribution of information only to members of designated groups, without any requirement or condition that persons in other groups receive the same information, and permitted bidders in the designated groups to avoid the subcontracting percentages and good faith efforts to the extent they kept the required percentages or work themselves. Nonetheless, the court said if the statute had said "that all contractors must assure the opportunity to bid is advertised to all prospective contractors, including minority-owned and women-owned firms", it would have been upheld. Id. at 711. Thus, the proposed EEO regulations avoid the infirmities identified in Monterey Mechanical in that all regulatees are subject to the same requirements and nothing in the proposed regulations require hiring in order to meet any percentage goals.

137/ Peightal, 26 F.3d at 1557-58.

race-neutral.[138/] Consequently, the proposed EEO regulations rest on firm and safe constitutional terrain.

To summarize: based on court holdings, an EEO regulation may lawfully require regulatees to engage in targeted recruitment and outreach to minorities and women. The Lutheran Church court realized as much, having held in denying rehearing en banc that "the fact of encouragement [of minority hiring]...does not mean that any regulation encouraging broad outreach to, as opposed to the actual hiring of, a particular race would necessarily trigger strict scrutiny." Lutheran Church, 154 F.3d at 492. Thus, any new proposed regulations would be agreeable if they do not "go far beyond any nondiscriminatory outreach program." Id. The Commission's proposal meets this standard. Consistent with the authorities discussed above, a recruitment and outreach program may require:

138/ See Messer v. Meno, 936 F. Supp. 1280, 1287 (W.D. Tex. 1996) ("Messer"). There, the affirmative action plan focused on recruitment of minorities for the applicant pool and expressly prohibited favoritism in the actual selection of the successful candidate. The plan also called for the preparation of utilization reports which purported to gather extensive gender and ethnic breakdowns of the state workforce, both of the entire workforce, and by category of position. Id. at 1286. In dictum, the court stated that the state employer's "utilization reports" were arguably coercive with respect to hiring decisions and implicated Hopwood's prohibitions, but did not decide the issue. See also Hall v. Kutztown Univ. of the Penn. State System of Higher Education, 1998 U.S. Dist. LEXIS 138 (E.D. Pa. January 12, 1998) ("Hall"). There, a search committee initially proposed a list of interviewees that was composed exclusively of White males. The university officials became concerned about possible claims of unlawful exclusion of female and minority candidates in the screening process. To ensure that female and minority candidates were not placed at a disadvantage, the university took steps to increase the job applicant pool by recruiting female and minority applicants.

1. Contact with race- and gender-specific (minority and female) organizations or sources where contact is made with organizations and sources that typically serve White males.[139/]

2. Advertising of job vacancies in media that predominates in a minority community, when the licensee also advertises in media having a wider or national circulation.[140/]

3. Advertising and/or recruiting at and/or attending job fairs at educational institutions having a predominantly minority enrollment where the licensee recruits at educational institutions with predominantly White populations.[141/]

4. Establishment of recruitment methods that do not rely exclusively or predominantly upon word-of-mouth referrals or walk-in applications.[142/]

5. Collection of data on the race and gender of applicants for employment.[143/] However, to be consistent with Lutheran Church and heeding the concerns suggested in Messer, any regulations should not contain references to or require the gathering or monitoring of general workforce data as a point of comparison toward any numerical goal in hiring.[144/]

139/ Raso, 135 F.3d at 13-14; South Suburban, 935 F.2d at 872-83; Hall, supra.

140/ South Suburban, 935 F.2d at 872-73.

141/ Peightal, 289 F.3d at 1549.

142/ See pp. 63-72 supra.

143/ South Suburban, 935 F.2d at 872-73.

144/ At the same time, it is well-settled that data as to the race and gender of applicants may be used to establish statistical disparities in hiring to prove intentional discrimination. See Watson and Castenada.

6. Engage in self-assessment and review of existing recruitment and hiring programs.145/

The proposed regulations incorporate each of these factors.

Is it possible that these regulations could be written or implemented in so unsophisticated a manner that it would have the effect of "pressuring" employers to discriminate? It is theoretically possible -- if a program operates so clumsily as to require broadcasters to substitute minority or female recruitment for general recruitment, rather than have minority and female recruitment supplement general recruitment.146/ But in practice, the likelihood of any "pressure" to discriminate in hiring, flowing from a program like that proposed in the NPRM is extremely

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145/ The Department of Justice has advised federal agencies to regularly examine their recruitment practices to ensure that they are effective and productive and should determine whether minority applicants have been deterred as a result of past discriminatory practices or the agency's reputation for discrimination, whether deserved or not. In the Department's view, Adarand does not preclude tracking minority participation in the agency's workforce through the collection and maintenance of statistics or the filing of reports with the EEOC. The Department also has taken the position that other actions such as reviewing qualification standards to ensure that unnecessary criteria that have a disproportionate impact on minorities are eliminated, are race-neutral. John R. Schmidt, Associate Attorney General, "Post-Adarand Guidance on Affirmative Action in Federal Employment," February 29, 1996, at 2.

146/ See South Suburban, 935 F.2d at 883; Shuford, 897 F.Supp. at 1553. "For example, outreach and recruitment efforts might be so intense and focused as to create a pool of minority applicants only, or interested white applicants might be steered away from applying...." Raso, 958 F.Supp. at 703. Alternatively, if the employer "began recruiting at black and women's colleges and stopped recruiting at [a predominately White male college], this would be an instance of exclusion. In order to be truly inclusive, recruitment must be balanced....The court has a responsibility to ensure affirmative action techniques that purport to be inclusionary are actually inclusionary." Shuford, 897 F.Supp. at 1553.

remote.147/ The Commission should recall that in Lutheran Church, there was no evidence in the record that any employer subject to the ostensibly overaggressive original EEO Rule had ever acted on any supposed "pressure" to hire minorities. Indeed, a recent study by MMTC found that in approximately three million hiring decisions, and 75,000 license renewals in the broadcasting industry in the 28 years between 1971 and 1997, there had not been one complaint of "reverse discrimination." MMTC, "FCC EEO Enforcement, 1994-1997" (May 13, 1998) at 28 (discussed in Volume II infra).148/ By eliminating even the hypothetical source of "pressure" objected to by the Lutheran Church majority, it is unthinkable that there would ever be genuine allegations of reverse discrimination149/ -- much

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147/ As the Seventh Circuit has held, "[i]n the absence of concrete evidence" that a recruitment program is being manipulated to provide a preference to minorities, there is "nothing wrong with...attempting to attract [minorities] to housing opportunities they might not ordinarily know about and thus choose to pursue." South Suburban, 935 F.2d at 884. As the Shuford court concluded in evaluating the recruitment program at issue there, "the techniques for expanding the applicant pool are inclusionary on their face. There is no suggestion that...conducting affirmative recruitment will cause any harm to qualified applicants other than increased competition" and thus are "justifiable without resort to traditional Title VII and equal protection analysis." Id. at 1553.

148/ Reverse discrimination allegations are extremely uncommon. For example, of all race-based charges received by the EEOC from FY 1987 to FY 1994, only 4.1% were made by White males. Of all sex-based charges received by the agency, only 17.6% were made by males. Citizens Commission on Civil Rights: "Affirmative Action: Working and Learning Together", at 33.

149/ We are sure to hear the complaint that the evaluation of whether an applicant is able to be interviewed, rather than just be encouraged to send in an application, translates into "pressure to hire." That argument has no merit, for three reasons.

[n. 149 continued on p. 85]

149/ [continued from p. 84]

First, review of interviewing criteria is necessary to ensure that minorities and women have a chance to prove their qualifications. A broadcaster does nothing for equal opportunity by going through the motions of generating applications or resumes from minorities and women, then throwing them in the garbage. Interviewing, like recruitment, is part of the process by which qualified persons are given a full opportunity to present their credentials. The hiring process -- into which the Commission cannot intervene barring evidence of discrimination -- begins after interviews are concluded and all the evidence (written and oral) is in. To draw the "pressure" fault between applying and interviewing is akin to a rule saying that encouragement of applicants' written best case is constitutionally agreeable but consideration of applicants' oral best case is not -- which is absurd. It is like saying that a licensee must permit minorities and women to drop applications in its mailbox, but the licensee is not required actually to talk to any of these applicants and give them a chance to prove they have the ability to do the job.

Second, review of interviewing criteria is necessary to prevent discrimination. The broadcaster would be required to find a race- and gender-neutral but objective way to select interviewees from the applicant pool (e.g., by excluding from sales interviews those with no sales experience or training in any field and no other experience readily transferable to sales.) Since the full qualifications of an applicant are seldom evident from a written application, employers making hiring decisions on this information alone are acting subjectively. Thus, it would be dangerous to allow a licensee arbitrarily to adopt a scheme that excludes minority and female applicants from the interview room. Since talent is distributed equally, something is wrong when a licensee attracts minority and female applicants but seldom or never interviews them.

Third, broadcasters are already immunized from any erroneous FCC attempt to require them to prefer minorities or women as interviewees. The FCC is bound by Title VII, which prevents preferential treatment on the basis of, inter alia "an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national original employed by any employer, referred or classified for employment by any employment agency or labor organization[.]" 42 U.S.C. ¶2000e-2(j) (1996) ("Preferential treatment not to be granted on account of existing number of percentage imbalance") (emphasis added). Thus, absent systemic discrimination, the FCC could not require a licensee to have a particular statistical representation of interviewees, and the NPRM does not and has never proposed any such thing. That may explain why, for 29 years under the original EEO Rule, there was not one complaint of reverse discrimination involving a failure to interview. It is unlikely there will many legitimate complaints under the new proposed regulations either.

[n. 149 continued on p. 86]

much less a legitimate lawsuit.150/ Indeed, as a safety valve against any possible discrimination, the Commission has proposed to add an express nondiscrimination statement to the recruitment sections of its proposed regulations.151/ As it has in the past,152/ the Commission can shut the door on any possible discrimination, reverse or otherwise, by speaking out (and imposing sanctions if need be) when licensees discriminate in hiring.

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149/ [continued from p. 85]

Consequently, if the interviewee selection process is entirely race- and gender-neutral, the FCC should insist that minority and female applicants have a fair opportunity to make it not only into the mailbox, but into the interview room. Indeed, anything less than a full chance to present one's credentials is completely unacceptable: it would be a Jim Crow system under which minorities and women are encouraged to apply through the backdoor of written application forms, but not through the front door of an interview.

150/ For example, here is how a Title VII charge of reverse discrimination involving interviewing (see n. 149 supra) would read: "I wasn't hired because the employer included a woman, with better qualifications than me, in its interview pool, along with me. Then the employer hired the woman. But if the broadcaster had not felt so "pressured" to hire women that it included this woman in the interview pool, I would have been hired. The broadcaster discriminated against me by refusing to set up one of the all-male interview pools to which I have been accustomed." Such a Title VII charge will never be filed. See Fed. R. Civ. Proc., Rule 11.

151/ NPRM, 13 FCC Rcd at 23039, Appx. A. This step was suggested by Judge Edwards in his dissent to the denial of rehearing en banc in Lutheran Church, 154 F.3d at 498.

152/ See Alabama/Georgia Renewals, 95 FCC2d at 9; Gaines, 10 FCC Rcd at 6593. The other side of this coin is that the Commission should always emphasize that stations with inadequate outreach programs will never be immunized from enforcement actions by virtue of who they hired. See, e.g., Kelly Communications, Inc., 12 FCC Rcd 17868, 17871-72 ¶¶11-13 (1997). It should also emphasize that except where selection criteria were discriminatory, stations will adequate outreach programs face no sanctions by virtue of who they hired. See, e.g., Louisiana Broadcast Stations, 7 FCC Rcd 1503, 1505 ¶¶16-19 (1992).

III. Is EEO Enforcement Justified?

A. EEO enforcement is justified to prevent discrimination

1. Is there a rational basis for barring discriminators from enjoying protected access to the spectrum?

Fair EEO regulations are eminently justified in seeking to ban current discrimination and to prevent future discrimination. As Commissioner Powell declared, "[i]f the public interest means anything at all it cannot possibly tolerate the use of a government license to discriminate against the citizens from whom the license ultimately is derived." NPRM, 13 FCC Rcd at 23052 (Separate Statement of Hon. Michael K. Powell).

It would be unfair to suggest that everyone who disagrees with Commissioner Powell is trying to promote White supremacy. Some non-racist, well intentioned people have a philosophy that conceptualizes a television set as a toaster with pictures. With the greatest respect, they are wrong. Americans must never sever technology from values. Because we value human life, government does not allow automobiles to be licensed without safety regulation. Because we value species diversity, government does not provide hunting and fishing licenses without environmental regulation. And because we value a fair chance for all Americans, government should not allow broadcast stations to be licensed without equal opportunity regulation.

Those entitled to the fruits of the "larger and more effective use of radio" are "all the people of the United States." 47 U.S.C. §151 (1934). To these words, the Telecommunications Act of 1996 added the words "without discrimination on the basis of

race, color, national origin, religion or sex". 47 U.S.C. §151 (1996).

This nondiscrimination requirement flows from the nature of a the radiofrequency spectrum resource: it is public property, loaned by the government, on easy terms, to private citizens to use in the public interest. While a broadcaster's behavior using that property is not state action, the government's behavior in ratifying, validating, or rewarding that behavior is state action.

Throughout our history, governments have been expected to act on behalf of the general public when they administer property held in public trusteeship. See Susan D. Baer, "The Public Trust Doctrine -- A Tool to make Federal Administrative Agencies Increase Protection of Public Land and its Resources," 15 B.C. Envir. Aff. L. Rev. 385 (1988). This principle has enjoyed a secure berth in American law since 1821, when the New Jersey Supreme Court, holding that a state legislature could not alienate public access and use rights in water resources, declared that "[t]he sovereign power itself, therefore, cannot, consistently with the principles of the law of nature and the constitution of a well ordered society, make a direct and absolute grant of the waters of the state, divesting all the citizens of their common right." Arnold v. Mundy, 6 N.J.L. 1, 78 (1821).

The radiofrequency spectrum belongs to the American people: it is held in trust for the public's benefit. Office of Communication of the United Church of Christ v. FCC, 359 F.2d 994, 1004 (D.C. Cir. 1966) ("UCC I"). As the trustee, the FCC has an affirmative duty to protect the trust property, just as the Interior Department has an affirmative duty to protect federal

public lands even as it permits private citizens to use and profit from them.

Federal public lands "are held in trust for the people of the whole country," Light v. U.S., 220 U.S. 523, 537 (1911) (quoting U.S. v. Trinidad Coal & Coking Co., 137 U.S. 160 (1890), and upholding Forest Service regulations regarding grazing in national forests). The National Park Service Organic Act, 16 U.S.C. §§1-460 (1982 and Supp. IV 1986) imposes a duty on the Secretary of the Interior to "conserve the scenery and the national and historic objects and the wild life [in national parks, monuments, and resevations]...and to provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations." See 16 U.S.C. ¶1 (1982). Yet poverty and housing segregation has forced some of our citizens into ghettos and allowed others to buy huge spreads of suburbia. Thus, the Interior Department would not think of authorizing a Whites-only National Park, and it would not think of permitting the operator of a national park concessionare or lodge operator to discourage minority patronage and tenancy. Likewise, the FCC should not even think of authorizing the use of the radiofrequency spectrum by discriminators.

This principle translates into broadcast law under the paradigm of "character" -- the unremarkable notion that broadcasters ought to aspire to a higher standard than the amorality of the marketplace. Assurance of broadcasters' character has always been a primary reason for EEO enforcement. Nondiscrimination - 1968, 13 FCC2d at 771. Beginning with Chapman Television and Radio Co., 24 FCC2d 282 (1970) ("Chapman"), in which

the Commission expanded hearing issues to consider an applicant's principal's role in developing and covering up the segregation policies of a cemetery he partly owned, the Commission has recognized that race discriminators lack the requisite character to serve as Commission licensees. This principle was extended to sex discrimination in Henderson Broadcasting Co., Inc., 54 FCC2d 71 (Rev. Bd. 1975), in which the Review Board added a discrimination issue when a major stockholder in an applicant for a construction permit was found guilty of sex discrimination in his insurance business.

The courts have long and uniformly agreed with this principle. As the D.C. Circuit declared nearly a generation ago, "[a] documented pattern of intentional discrimination would put seriously into question a licensee's character qualifications to remain a licensee: intentional discrimination almost invariably would disqualify a broadcaster from a position of public trusteeship. Where responsible and well-pleaded claims of discrimination have been made, therefore, the FCC may be required to hold a hearing to resolve these charges before granting a license renewal." Bilingual II, 595 F.2d at 629.

We firmly believe that barring and preventing discrimination is a compelling government interest. But the Commission need not decide that now, because the regulations it has proposed are race- and gender-neutral. As shown above, the government has long had a rational basis for antidiscrimination regulation. That is enough, by itself, to sustain the Commission's proposed regulations.

2. Is recruitment a necessary component of a discrimination prevention program, or is a rule against discrimination sufficient?

An EEO rule to remedy past discrimination is well justified. See pp. 97-133 infra. However, it would be a serious mistake for an EEO regulation to serve only a remedial purpose. Florida State University constitutional law scholar Ann McGinley writes:

> The characterization of affirmative action as remedial rather than preventative reinforces a belief that discrimination no longer exists and that innocent white males are paying for the sins of their forefathers....an important justification for affirmative action is to prevent the reproduction of privilege through the normal, apparently neutral, operation of processes that cause discrimination.... affirmative action also has the potential of preventing unconscious discrimination resulting from invisible white privilege. Indeed, this prevention of "blameless," unconscious discrimination may be the most important justification for affirmative action.

A. McGinley, "The Emerging Cronyism Defense and Affirmative Action: A Critical Perspective on the Distinction Between Colorblind and Race-Conscious Decision Making Under Title VII", 39 Arizona L. Rev. 1003 (Fall, 1997).

The proposed outreach regulations may accurately be labelled "Steps to Prevent Discrimination." See Lutheran Church, 154 F.2d at 496 (Dissenting Statement of Judge Edwards). Such a denotation would honor longstanding precedent and also be operationally accurate. As the Commission realized as early as 1970, an antidiscrimination regulation would prove insufficient to prevent

unintentional discrimination.[153] From the perspective of the viewers and listeners, and from the perspective of minorities and women unfairly kept ignorant or otherwise deprived of opportunities for which they are qualified, it matters little whether the cause was the employer's negligence or his conscious evil intent.[154]

As we have noted, practices such as word-of-mouth recruitment from a homogeneous workforce are inherently discriminatory. See pp. 63-72 supra. Frequently, this practice is intentionally performed with the conscious intent of perpetuating White male privilege. But intent is extremely difficult to prove absent a clumsy admission or an inside source willing to risk her career by coming forward.[155] Furthermore, prejudice may be unconscious, or when conscious, any evil intent may rest with a middle manager, without the knowledge, much less the intent, of the licensee's

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153/ Discrimination prevention procedures "make the broadcaster focus on the problem." Petition for Rulemaking to Require Broadcast Licensees to Show Nondiscrimination in Their Employment Practices (Report and Order), 23 FCC2d 430, 433 (1970). "No matter how informal a station's procedures, the requirement that it periodically think about its EEO efforts seems wholly reasonable." Office of Communication of the United Church of Christ v. FCC, 560 F.2d 529, 534 (2d Cir. 1977) ("UCC III").

154/ Even unconscious race prejudice, if it "produces behavior that has a discriminatory result" may be "as injurious as if it flowed from a consciously held motive." Charles R. Lawrence III, "The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism," 39 Stanford L. Rev. 317, 344 (1987).

155/ One-victim-at-a-time adjudications of discrimination cases is manifestly inefficient, especially in closely-knit industries like broadcasting. See, e.g., Sheridan v. E.I. DuPont de Nemours and Co., 100 F.3d 1061, 1071 (3d Cir. 1996) (en banc), cert. denied, 117 S.Ct. 2532 (1997) ("[c]ases charging discrimination are uniquely difficult to prove and often depend upon circumstantial evidence....direct evidence of an employer's motivation will often be unavailable or difficult to acquire.")

principals.[156] We recognize that situations do arise where it could be inequitable to hold an employer punitively liable for every failure to closely supervise a middle manager.[157]

156/ This observation flows from the nature of the corporation itself as a vehicle for organizing the accomplishment of work. In a corporation, responsibility flows downward through delegation pipelines, and accountability and validation flow upward through feedback pipelines. These pipelines' capacities are often insufficient to carry information about priorities companies may perceive as secondary -- such as equal opportunity. That is why the owner's nondiscrimination policy may never reach subordinates, or if it does, subordinates' efforts to implement that policy may not be communicated back to senior management for validation, sanction or reward. This feature of corporations explains, e.g., why an antipollution policy is insufficient to keep the streams clean, and why an anti-theft policy is insufficient to keep stock on the shelves. In broadcasting, it explains why a bare policy against out-of-band broadcasts is insufficient to prevent interference, and why rules requiring engineering logs and competent engineers are needed to carry out the Commission's anti-interference policies. Zenith, supra. The technical rules could well be named "Steps to Prevent Chaos on the Airwaves." In this tradition, the proposed EEO regulations fit comfortably into the culture of broadcast regulation in effect since 1927.

157/ As in every other area of law which draws distinctions between negligence and deliberate unlawful acts, intent is germane to the remedy. That is why negligence should result in forfeitures; an unintentional act or omission is seldom of license-disqualifying magnitude. However, deliberate discrimination should always result in loss of license. Bilingual II, 595 F.2d at 629. Unlike a negligent actor, a deliberate discriminator has forfeited the right to claim that he can be reformed. Office of Communication of the United Church of Christ v. FCC, 425 F.2d 543 (D.C. Cir. 1969).

There is an important corollary to this rule: when an employer knows that it is expected to take steps to recruit to avoid discrimination, its intentional election not to take those steps could be one piece of evidence of discriminatory intent. See, e.g., Craik v. Minnesota State University Board, 731 F.2d 465, 472 (8th Cir. 1984) and Garland v. USAir, 767 F.Supp. 715, 726 (W.D. Pa. 1991) (evidence that an employer has failed to live up to an affirmative action plan is relevant to the question of discriminatory intent); Gonzalez v. Police Dept., City of San Jose, California, 901 F.2d 758 (9th Cir. 1990); Yatvin v. Madison Metropolitan School District, 840 F.2d 412, 415-416 (7th Cir. 1988); Taylor v. Teletype Corp., 648 F.2d 1129, 1135 n. 14 (8th Cir.), cert. denied, 454 U.S. 969 (1981); Chang v. University of Rhode Island, 606 F.Supp. 1161, 1183 (D.R.I. 1985). In these instances, where there is other evidence of discrimination, punitive steps could be justified.

Because so much discrimination is either unintentional or characterized by hidden and unprovable intent, any meaningful program to eradicate discrimination necessarily must include specific preventative steps, such as targeted recruitment. The absence of discrimination prevention requirements merely invites employers to conceal their discriminatory acts, disclaim any discriminatory intent, or outspend, retaliate against or pay off any alleged named victims.

Considerable research has demonstrated that only through preventative measures can discrimination be rooted out. See Reskin at 33 ("advertising jobs circumvents the bias associated with the use of informal networks only if employers advertise in media that are visible to minority job seekers" (discussing William Julius Wilson, in When Work Disappears: The World of the New Urban Poor (1996)).

The FCC is capable of evaluating individual discrimination allegations, but in most cases the EEOC is better suited to that task. On the other hand, the EEOC is not well suited at all to the task of implementing a discrimination prevention program tailored

to a particular specialized industry.[158/] Not only does the EEOC lack jurisdiction to undertake this task, its focus on intentional discrimination would overlook the most invidious practices typically visited on minorities and women by broadcasters,[159/] and the EEOC's 15-employee jurisdictional limit would immunize almost 2/3 of the broadcasting industry from any EEO responsibility whatsoever.[160/] Consequently, the longstanding division of labor

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158/ In Bilingual II, 595 F.2d at 628, the Court explained that "[i]n conducting these two analyses the [FCC] is concerned, respectively, with two distinct policies, affirmative action and anti-discrimination. In implementing its affirmative action policy, the FCC functions very differently from the EEOC, both in the type of inquiries it makes and in the types of sanctions it can impose. The EEOC aims primarily to remedy the effects of past discrimination: in its efforts to make aggrieved persons whole, it can invoke an array of retrospective remedies, including reinstatement, promotion, and restoration of seniority or back pay. The FCC, by contrast, is concerned primarily with the future: in its efforts to ensure that programming reflects minority interests, it invokes prospective, administrative sanctions - short-term license renewals and license renewals conditioned on reporting - which enable it to monitor broadcasters' progress in recruiting and hiring minority workers. Because its affirmative action policy is prospective, the Commission rarely designates license renewal applications for hearing solely to investigate substandard affirmative action performance." (footnotes omitted; emphasis in original).

159/ The nature of word-of-mouth recruitment as a discriminatory practice is virtually a "perfect crime." It works by ensuring that minorities and women are deprived of knowledge of a job opening. This has two advantages for the discriminator: (1) the minority or woman never has a chance to be employed; and (2) he or she is simultaneously deprived of the most basic information needed to file a complaint. See CCH, EEOC Compliance Manual (1998) ¶632.02(f) ("the courts and the Commission have held that only an individual who has a real and present interest in the type of employment advertised, and who was stopped by the improper advertising from applying for such employment is aggrieved and can file a charge under Title VII.")

160/ EEO Streamlining Broadcast EEO Rule and Policies (Order and NPRM), 11 FCC Rcd 5154, 5164-65 ¶34 (1996) ("Streamlining"). See J. Trigg, "The Federal Communications Commission's Equal Opportunity Employment Program and the Effect of Adarand Consrtructors, Inc. v. Peña," 4 CommLaw Conspectus 237, 256 (1996) ("Trigg").

between the FCC and the EEOC[161] is reasonably sound and should remain in force.[162] However, the Commission should exercise more diligence in evaluating multiple or especially egregious systemic discrimination allegations on its own motion at license renewal time.[163]

161/ Individual discrimination allegations initially presented to the FCC are automatically crossfiled with the EEOC under the FCC/EEOC Agreement, 70 FCC2d 2320 (1978) ("FCC/EEOC Agreement"). Under that agreement, either the EEOC or the FCC has authority to initially investigate these allegations. Id. at 2327. While the EEOC usually performs this investigation, the FCC/EEOC Agreement provides that "situations may arise in which the Commission may act before a court decision." Id. at 2328 ¶21; see also id. at 2327 (providing that the FCC may inquire into EEO complaints "even before the EEOC's conciliatory process ends", citing Report on Uniform Policy as to Violations by Applicants of Laws of the United States, 1 RR, Part 3, §91.495 (1951), 42 FCC2d 399 (1973)) and at 2328 n. 12 (FCC is not precluded from undertaking a "collateral... investigation of employment matters in appropriate cases.")

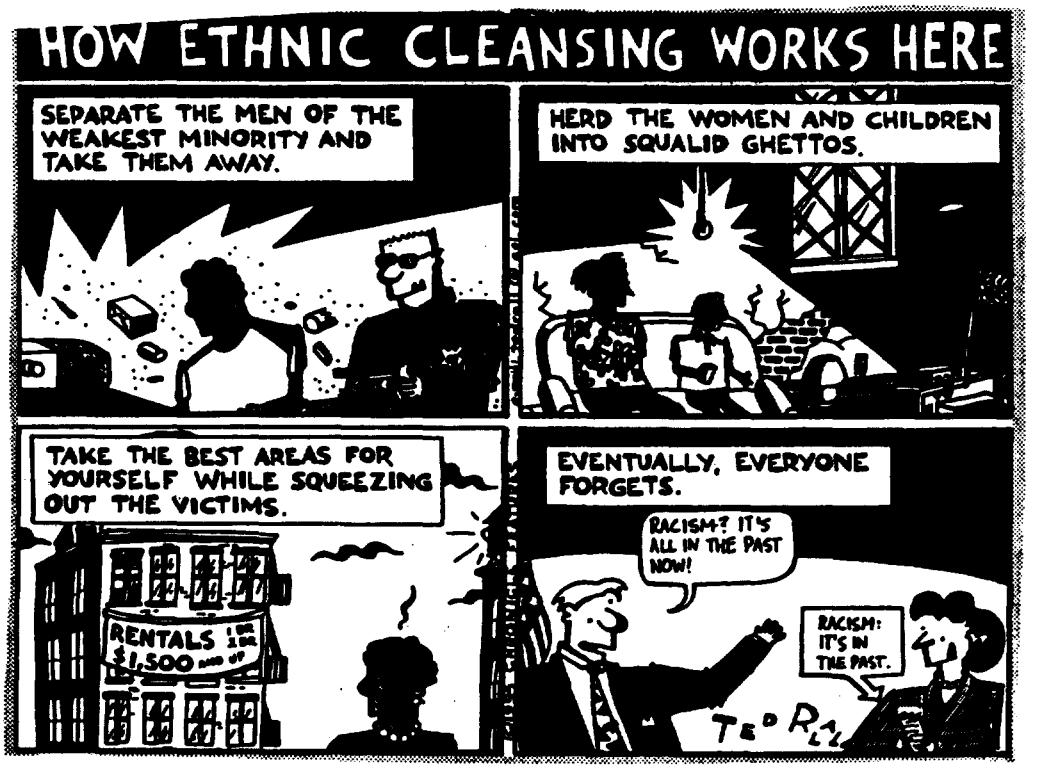
162/ A magnificent analysis of this issue can be found in Trigg, 4 CommLaw Conspectus at 255-56. We note that the EEOC has proposed to modify the 1981 Memorandum of Understanding between the EEOC and the Department of Labor's Office of Federal Contract Compliance Programs (OFCCP) to allow OFCCP to act as the EEOC's agent to process and resolve Title VII components of charges filed under both Executive Order 11246 and Title VII. "OFCCP and EEOC Agree on Labor Agency's Enforcement of Some Title VII Cases", Fair Employment Report, December 15, 1998, at 186. The FCC might be well advised to consider taking a similar step to further harmonize its relationship with the EEOC.

163/ FCC/EEOC Agreement, 70 FCC2d at 2327 (authorizing FCC to evaluate EEO charges on its own in order to protect the public interest.) The acceleration of station sales means that almost no Title VII discrimination case can reach finality before the typical radio station changes hands. Finality in an EEOC case often requires the better part of two decades, but the typical radio station changes hands every two to four years. This acceleration in station sales has completely swallowed the Commission's NBC Policy, which holds that the Commission reviews individual allegations of discrimination only upon finality of any Title VII proceedings. The NBC Policy takes its name from NBC, Inc., 62 FCC2d 582 (1977) (Commissioners Hooks and Fogarty dissenting).

[n. 163 continued on p. 97]

B. EEO Enforcement is justified to remedy past discrimination

1. Does FCC action regulating broadcasters potentially justify remediation of any FCC fortification its licensees' discrimination?



Even if the proposed EEO regulations were subject to strict scrutiny, theey would be valid as an effort to remedy the effects of past discrimination. Indeed, we contend that not only can the

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163/ [continued from p. 96]

Even before the current wave of station trading, discrimination allegations almost never received FCC review. For example, in 1973, six African-Americans filed race discrimination Title VII complaints against WSM Radio in Nashville. The Commission abstained from exercising jurisdiction, employing the NBC Policy. See WSM, Inc., 66 FCC2d 994, 1006-1008 ¶¶29-32 (1977). The Title VII litigation concluded in 1989 with final orders to the effect that the licensee had discriminated against three of the plaintiffs. Unfortunately, by then the stations had changed hands three times -- meaning that the Commission would have had to unscramble three ownership "generations" of eggs to reach the discriminator. The FCC has only twice unscrambled a broadcast assignment of license and each case was extreme; see Michigan Television Network, Inc., 72 FCC2d 782 (1979) (an agent of a foreign government held an undisclosed interest in the applicant).

Commission require broadcasters to undertake specific steps to promote nondiscrimination, the Commission must do so in light of its own own former actions and omissions in licensing. Generations of discrimination against minorities in broadcasting can be traced to the Commission's practice of deliberate licensing of segregationists. Thus, the EEO Rule is justified by the Commission's interest in remedying the present effects of past discrimination. To understand why this rises to a constitutional injury which both permits and requires remediation, it is first necessary to understand the evolving concept of broadcast public trusteeship -- which Congress expressly tied to the nondiscrimination principle.164/

The public trustee concept emerged as the first theoretical construct that provided the constitutional justification for Commission regulation of broadcasters. As public trustees, broadcasters are given an opportunity -- unavailable to virtually all others -- to exclusively use and exploit a scarce and valuable public resource, the broadcast spectrum.165/ In exchange for the privilege of using this resource, broadcasters have had an added obligation to serve "the public interest, convenience and necessity" in operating their stations and in airing

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164/ See 47 U.S.C. §303(g) (1934) (under which the Commissions expected to provide for the "larger and more effective use of radio in the public interest"); 47 U.S.C. §151 (1934) (providing that the Commission was to ensure the delivery of wire and radio service "to all the people of the United States"); 47 U.S.C. §151 (1996) (eliminating any doubt about who "all the people" is by adding the words "without discrimination on the basis of race, color, national origin, religion or sex" to Section 151.)

165/ See Red Lion Broadcasting v. FCC, 395 U.S. 367 (1969) ("Red Lion").

programming."166/ Because of the scarcity rationale, the Commission was permitted to place "restraints on licensees in favor of others whose views should be expressed on this unique medium."167/ The raging debate over whether the spectrum is still "scarce" has no effect on how the question of the rationality of remediation of discrimination is resolved.168/

As early as 1943, the Court reaffirmed that the Commission's primary role in regulating the broadcast spectrum was to "secure

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166/ Charles Logan, "Getting Beyond Scarcity: A New Paradigm for Assessing the Constitutionality of Broadcast Regulation," 85 Calif. L. Rev. 1687, 1688 (1997) ("Logan").

167/ Red Lion, 395 U.S. at 388, 389.

168/ Few would disagree that the spectrum is finite, that many more entities wish to use it than can be accommodated, and that huge monopoly rents inure to those occupying it; indeed, by far the greatest portion of the appraised and sale value of most broadcast stations is the intangible value of the broadcast license. Nonetheless, it is frequently contended that the economic scarcity rationale for regulation has largely evaporated because of the growth of cable and other new technologies.

This argument need not detain us long, for the rationality of Commission action to remedy its own validation of the discrimination of its licensees does not depend on the outcome of this debate. Assuming, for the sake of argument, that the critics of the economic scarcity rationale are correct, it follows, as shown below, that broadcast regulation takes on the nature of supervision of a public forum. Whether broadcasters are public trustees of scarce spectrum or participants in a non-scarce public forum, the Commission has so profoundly influenced the course of the resulting stream of broadcast content that remediation of discriminatory actions aided by those regulatory hands are amply justified. We explain below.

The public forum analysis provides the basis for establishing property rights and a liberty interest in the spectrum for the American public, and specifically minorities. The Supreme Court's public forum doctrine establishes elements by which the Court reviews the government's ability to regulate speech in, as well as access to, public forums, such as public parks, streets and near school buildings. See Hague v. CIO, 307 U.S. 496 (1939).

[n. 168 continued on p. 100]

the maximum benefits of radio to all the people of the United States." NBC v. United States, 319 U.S. 190, 2178 (1943). The Court, however, recognized that the radio spectrum was not expansive enough to accommodate everyone. Accordingly, the Commission was authorized to determine not only what type of speech was allowed on the spectrum, but also to limit who gained access to the spectrum.169/

Thus, when the Commission discriminated in exercising these powers, it denied minorities the enjoyment of their property rights in the spectrum and their liberty interest in enjoying the use of the spectrum. There are several proprietary elements inherent in both the commercial enterprise and regulatory administration of broadcast licenses that confer a liberty interest or property

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168/ [continued from p. 99]

This idea was based on the concept that public forums were held in trust for the benefit of the public to exchange ideas, public debate and communication between citizens. Id. at 515. The Court imbued the public forum with characteristics of property and, therefore ownership, by stating that the government has "power to preserve the property under its control for the use to which it is lawfully dedicated." See Cornelius v. NAACP Legal Defense & Education Fund, 473 U.S. 788, 799-800 (1985).

The public forum analysis extends to both tangible and intangible property. Consequently, broadcasting has the characteristics and traits of a limited public forum because it is "public property which the State has opened for use by the public as a place for expressive activity" that is created "for a limited purpose...for use by certain groups...for the discussion of certain subjects." Perry Education Ass'n v. Perry Local Educators' Ass'n., 460 U.S. 37, 45 and 46 n. 7 (1983). See also Logan, 85 Calif. L. Rev. at 1710-1712. Consequently, the public forum paradigm easily accomodates the key concept underlying any discussion of the rationality of remediation: that the government has had, and continues to have, a substantial role in the deployment of broadcast content, subject to the anti-censorship limitations required by the First Amendment.

169/ See, e.g., Red Lion, 395 U.S. at 389-90.

entitlement. In fact, "it is apparent that the granting of a license by the Commission creates a highly valuable property right, which, while limited in character nevertheless provides the basis upon which large investments of capital are made and large commercial enterprises are conducted."[170] Thus, any historical denial to minorities of access, entry and use of broadcast property because of Commission actions would have abridged minorities' constitutionally protected right to pursue a lawful business.

Since the FCC has always been the only body that controlled access to the spectrum, any procedure by which the FCC may have arbitrarily denied minorities access to the spectrum would have stigmatized them and created an irreparable disability. That disability would include the right to speak in the public forum of broadcasting and the right to "work for a living in the common occupations of the community."[171]

Accordingly, by validating the intentional, de facto and sometimes de jure discrimination of its licensees, the Commission engaged in the constitutionally impermissible deprivation of a liberty interest in violation of the Due Process clause.[172]

170/ William L. Fishman, "Property Rights, Reliance and Retroactivity Under the Communications Act," 50 Fed. Comm. L. J. 1 (1997).

171/ Board of Regents of State Colleges v. Roth, 408 U.S. 564, 572 (1972). The right to work is "the very essence of personal freedom and opportunity that was the purpose of the 14th Amendment to secure." Id. This personal freedom is also defined as a liberty interest: "the right...to engage in any of the common occupations of life, to acquire useful knowledge. [I]n a Constitution for a free people, there can be no doubt that the meaning of liberty must be broad." Id.

172/ See Matthews v. Eldridge, 424 U.S. 319 (1976); Wolff v. McDonnell, 418 U.S. 539 (1974); Perry v. Sindermann, 408 U.S. 593 (1972); Wisconsin v. Constantineau, 400 U.S. 433 (1971); Goldberg v. Kelly, 397 U.S. 254 (1970).

Since the Commission's actions in broadcast regulation -- financed by the taxpayers -- have been sufficiently influential to affect constitutionally protected rights, it follows that remedial steps would be justified.[173] Indeed, remediation of government-assisted discrimination is a compelling interest.[174] That interest permits the Commission to remedy the identified effects of its own discrimination, or of its own practices that unintentionally extend the effects of discrimination by others. In other words, race-based remedial action may be aimed at ongoing patterns and practices of exclusion, or at the lingering effects of

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173/ Croson, 488 U.S. at 492.

174/ Id., acknowleding that a government "has a compelling interest in assuring that public dollars, drawn from the tax contributions of all citizens, do not serve to finance the evil of private prejudice.") Justice O'Connor's majority opinion in Adarand recognized that "[t]he unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in the country is an unfortunate reality, and government is not disqualified from acting in response to it." Adarand, 515 U.S. at 237. See also Wygant v. Jackson Board of Education. 476 U.S. 267, 286, rehearing denied, 478 U.S. 1014 (1986) (O'Connor, J., concurring in part and concurring in the judgment) ("Wygant") (observing that "[t]he Court is in agreement that, whatever the formulation employed, remedying past or present racial discrimination by a state actor is a sufficiently weighty state interest to warrant the remedial use of a carefully constructed affirmative action program.") Former Assistant Attorney General Patrick has declared that "[t]he need to remedy the effects of past discrimination by a state government undoubtedly constitutes a compelling interest." Testimony of Deval L. Patrick, Assistant Attorney General, Civil Rights Division, U.S. Department of Justice, Before the Subcommittee on Employer-Employee Relations, Committee on Economic and Educational Opportunities, United States House of Representatives, March 24, 1995, at 16.

prior discriminatory conduct that has ceased.[175] Since remedial action can be justified under strict scrutiny, it would easily meet the far more flexible test of rational basis scrutiny.

We demonstrate below that the FCC exercised its regulatory power to ratify, validate and fortify its licensees' discrimination, overwhelmingly to the detriment of minorities, and in some instances directly discriminated by barring minority entry irrespective of the qualifications of other applicants.[176]

175/ Adarand, 515 U.S. at 269 (Souter, J., dissenting) ("[t]he Court has long accepted the view that constitutional authority to remedy past discrimination is not limited to the power to forbid its continuation, but extends to eliminating those effects that would otherwise persist and skew the operation of public systems even in the absence of current intent to practice any discrimination.") A prior judicial, administrative, legislative determination of discrimination by the government is not required before the government may voluntarily choose to use affirmative action efforts. Croson, 488 U.S. at 500. However, an agency must have a "strong basis in evidence," for its determination that its practices have resulted in a significant exclusion or underutilization of minorities or have perpetuated exclusion perpetrated by others and that a race-based remedial effort is appropriate. Croson, 488 U.S. at 500, quoting Wygant, 476 U.S. at 277; see also Peightal, 26 F.3d at 1553; Concrete Works v. City and County Denver, 36 F.3d 1513, 1521 (10th Cir. 1994), cert. denied, 514 U.S. 1004, 115 S.Ct. 1315 (1995); Donaghy v. City of Omaha, 933 F.2d 1448, 1458 (8th Cir.), cert. denied, 502 U.S. 1059 (1991), O'Donnell Constr. Co. v. District of Columbia, 963 F.2d 420, 424 (D.C. Cir. 1992); Stuart v. Roache, 951 F.2d 446, 450 (1st Cir. 1991) (Breyer, J.); Cone Corp. v. Hillsborough County, 908 F.2d 908, 915 (11th Cir.), cert. denied, 498 U.S. 983 (1990). This does not mean that an agency must admit that it discriminated, either intentionally or inadvertently, before adopting affirmative action measures. See Johnson v. Transp. Agency, 480 U.S. at 652-53 (O'Connor, J, concurring); Wygant, 476 U.S. at 290 (O'Connor, J. concurring).

176/ The fact that the FCC's discriminatory actions were performed indirectly does not render them any less constitutionally invidious. For example, in the higher education context, "even after a State dismantles its segregative admissions policy, there may still be state action that is traceable to the State's prior de jure segregation and that continues to foster segregation.

[n. 176 continued on p. 104]

2. Did the FCC discriminate, and did it ratify, validate and fortify the discriminatory practices of its licensees?

For two generations, the FCC did absolutely nothing to counter its licensees' discrimination, even though its character qualifications standards should have prevented the licensing of discriminators. By systematically awarding licenses and license renewals to segregated and discriminating licensees, two generations of minorities were denied access and opportunity to obtain the experience, exposure and contacts needed to succeed in the broadcast industry.177/

176/ [continued from p. 103]

The Equal Protection Clause is offended by 'sophisticated as well as simple-minded modes of discrimination.' Lane v. Wilson, 307 U.S. 268 (1939). If policies traceable to the de jure system are still in force and have discriminatory effects, those policies too must be reformed to the extent practicable and consistent with sound educational practices" (emphasis in original). U.S. v. Fordice, 505 U.S. 717, 729 (1992) ("Fordice").

177/ Although this discussion focuses on minority exclusion, the FCC also presided over an invidious system of gender exclusion. Men received a three-generation headstart in the broadcasting business, with women excluded from sales and engineering jobs "partly because most station managers prefer a man" and from announcing jobs because women were not thought to be "physically able to endure the long hours of work." See Ronald Pesha, "Announcers Wanted, $25 a Week," Radio World, September 18, 1996, at 43 (quoting from the leading 1941 text, Waldo Abbot's Handbook of Broadcasting). Pesha, a broadcast historian, added that "[t]his is not to say that women could not find jobs in radio. Who else would purvey household hints and recipes, deliver talks about child training and etiquette, or do the filing? Many stations also employed 'hostesses' to greet visitors and conduct tours." It is noteworthy that as late as 1976, a Rochester, NY radio owner used a "Job Application - Male" form for announcers and a "Job Application - Female" form for secretaries. Federal Broadcasting System, Inc. (HDO), 59 FCC2d 356 (1976) ("Federal").

A recent law review article points out how this discrimination functioned in the process of licensing new facilities. Antionette Cook Bush and Marc S. Martin explain that:

> the agency granted radio licenses to exclusively non-minority applicants until 1956 and television licenses to nonminority applicants until 1973. Moreover, this disparity was further entrenched by the licensing methodology - comparative hearings - which favored applicants with experience in broadcasting. Few minorities had employment opportunities with broadcasting companies until the civil rights laws and cases concerning education, equal employment opportunities, fair housing, and voting rights in the mid-60s and early 70s - years after the valuable radio and full-power TV licenses had already been granted to nonminority applicants. Accordingly, the FCC's comparative hearing procedure contained an inherent bias in favor of nonminorities until reforms were finally adopted in 1978 (fns. omitted; emphasis supplied).

A. Bush and M. Martin, in "The FCC's Minority Ownership Policies from Broadcasting to PCS," 48 Federal Comm. Law Journal 423, 439 (1996) ("Bush and Martin"). Applicants for new broadcast licenses found that broadcast experience was necessary in order to obtain bank financing -- which, under the Ultravision rule, had to be sufficient to finance construction and a full year of broadcast operation with zero revenue.178/ The Fowler Commission quite properly repealed Ultravision, finding that it "conflicts with Commission policies favoring minority ownership and diversity because its stringency may inhibit potential applicants from seeking broadcast licenses."179/

178/ Ultravision Broadcasting Company, 1 FCC2d 545, 547 (1965) ("Ultravision").

179/ Financial Qualifications Standards, 87 FCC2d 200, 201 (1981).

Even a self-financed applicant would find that broadcast experience and "past broadcast record" were valuable and often determinative comparative criteria in these hearings. Even now "past broadcast experience" is enough to swing the grant from a minority to a nonminority in a comparative case. See, e.g., Great Lakes Broadcasting, Inc., 8 FCC Rcd 4007, 4010 (1993) (Dissenting Statement of Commissioner Andrew C. Barrett).

How could minorities obtain "broadcast experience" or "past broadcast record"? Certainly not in the customary manner -- attending a university whose broadcasting department operated an FCC-licensed noncommercial TV or FM training facility. Minorities were barred by state law from attending these schools.180/ Yet the FCC routinely provided, then renewed, broadcast licenses for these segregated institutions, thereby guaranteeing that a generation of trained broadcast employees in their states would be Whites only.181/ By doing so, the FCC either deliberately afforded state segregation laws precedence over the nondiscrimination requirement of Section 151 of the Communications Act -- a bizarre inversion of McCulloch v. Maryland, 4 Wheat. 316, 421, 4 L.Ed 579 (1822) -- or it implemented its astonishing belief that state segregation laws were actually harmonious with the Communications Act.

On top of this, the FCC routinely renewed, without investigation, the licenses of commercial stations which the FCC had to know were engaging in deliberate employment discrimination. The reason the FCC "had to know" is that, as an expert agency, it is

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180/ Black colleges were not a viable alternative, because state legislatures denied Black colleges the funds to start broadcasting programs or to apply for broadcasting station licenses.

presumed to be familiar with the fundamental policies of its licensees. FCC commissioners regularly speak to state broadcast associations. Some of the commissioners must have noticed that no Black persons were in attendance at these meetings, even in the capacity of station staff. They must have noticed, when visiting licensees' facilities, that no Blacks person worked there. Even if they didn't notice, they certainly must have noticed that, until the 1960's, the FCC's own staff was all-White except at the secretarial and janitorial levels. That couldn't have happened unless the regulated industry and the broadcast training schools, from which the FCC drew the bulk of its staff, were segregated, or unless the FCC itself discriminated in employment -- or both.

One might think that the Commission's "character qualifications" test, long part of the "public interest" standard in Sections 307 and 309 of the Communications Act, would have required the denial of segregationists' broadcast applications on character grounds. Incredibly, the reverse was true. Faced with an irreconcilable conflict between its own law and state segregation laws, the Commission gave full faith and credit to the state segregation laws.

This bizarre and probably unique inversion of federal supremacy was articulated in Southland Television Co., 10 RR 699, recon. denied, 20 FCC 159 (1955) ("Southland"). The Commission had to decide which of three applicants would be granted a construction

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181/ Examples include WBKY-FM, University of Kentucky, licensed in 1941, WUNC-FM, University of North Carolina, licensed in 1952, and KUT-FM, University of Texas, licensed in 1957. There were dozens of others, both public and private.

permit which would confer -- for free -- millions of dollars of spectrum space to be used to construct a VHF television station in Shreveport.

One of the applicants, Southland Television, was headed by Don George. Mr. George's business was movie theater ownership. Louisiana law governing movie theaters assumed that the theaters had two stories, like the 19th century opera houses on which they were modeled. The law required the admission of all races to theaters so long as the theater owners restricted each story to members of a particular race.182/

Mr. George did not want Blacks to patronize his theaters at all. Ironically, he was hampered by the literal language of the Louisiana movie theater segregation law. To circumvent the law, he built Louisiana's first one-story movie theaters, and operated Louisiana's only Whites-only drive-in theaters.183/

One of the competitors for the license, Shreveport Television, was the first broadcast applicant to include Black stockholders. Shreveport Television noted that Mr. George's application contemplated construction of a studio for live broadcasts. Shreveport Television asked the Commission to disqualify Mr. George's company from holding a broadcast license because, based on Mr. George's history of movie theater operations, he could be expected to deny Blacks the opportunity to be seated in the studio

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182/ The law was thought at the time to be race-neutral because the theater owners, rather than the state, decided which race was consigned to which story of the theaters. But every Black person over 40 remembers which story was the "Black" story.

183/ Other Louisiana drive-in theaters enforced segregation only within each automobile, to discourage miscegenation.

audiences of live productions at the television station.184/

The Commission was unmoved. It held that it lacked evidence that "any Louisiana theatres admit Negroes to the first floor" of theaters, nor any evidence that "such admission would be legal under the laws of that state." Id., 10 RR at 750. Thus did the Commission give full faith and credit to state segregation laws and to broadcasters' deliberate efforts to evade even the weakest state laws permitting some integration.185/

During the 1950s, the FCC continued to look the other way while broadcasters discriminated in the most open and notorious manner imaginable. In 1956, almost every southern NBC affiliate refused to carry "The Nat King Cole Show" -- forcing NBC to cancel the critically acclaimed program. Faced with this open and especially repugnant expression of race discrimination by dozens of broadcast licensees, the FCC did nothing.

In the 1960s, the civil rights movement hardly left the FCC untouched. As the FCC was aware, it was not until 1962 that a television network (ABC) employed a Black reporter (Mal Goode, as

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184/ Since videotape was not invented until 1956, television broadcasts were done before live audiences, in studios set up to resemble miniature movie theaters. Southland Television proposed to have a balcony in its studio.

185/ Citing Southland, three years ago the FCC tentatively acknowledged for the first time that a good case could be made that "[a]s a result of our system of awarding broadcast licenses in the 1940s and 1950s, no minority held a broadcast license until 1956 or won a comparative hearing until 1975 and...special incentives for minority businesses are needed in order to compensate for a very long history of official actions which deprived minorities of meaningful access to the radiofrequency spectrum." Section 257 Proceeding to Identify and Eliminate Market Entry Barriers for Small Businesses (Notice of Inquiry), 11 FCC Rcd 6280, 6306 (1996) (citing Statement of David Honig, Executive Director, Minority Media and Telecommunications Council, En Banc Advanced Television Hearing, MM Docket No. 87-268 (Dec. 12, 1995) (on file with counsel of record) at 2-3 and n. 2).

its United Nations correspondent). But the FCC's response to the cry for freedom reflected timidity and hostility, in stark contrast to the forthright efforts of other agencies of the Kennedy and Johnson administrations.

The first test of where the Commission stood on civil rights came in Broward County Broadcasting, 1 RR2d 294 (1963). The case involved a new AM radio station, WIXX. The station was licensed to and situated in Oakland Park, a suburb adjacent to Ft. Lauderdale. The substantial Black population of Ft. Lauderdale received no Black oriented programming from any station. Consequently, WIXX decided to devote its program schedule to Black-oriented news, public affairs and music. Id. at 296.

The City of Oakland Park complained to the Commission that WIXX was offering a format which the city did not need or want because "the Negro population to be catered to all reside beyond the corporate limits of Oakland Park." Id. at 294. The city government was fearful that Black professionals, once hired by WIXX to produce its programming, might choose to buy homes near their jobs.

Obviously, the Commission had no business regulating program formats.186/ Instead, it threw the station into a revocation hearing in which it could have lost its license. The station's

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186/ Eighteen years later, the Supreme Court held that the Commission may not regulate program formats. FCC v. WNCN Listeners Guild, 450 U.S. 582 (1981). But even in 1963, the Commission had only rarely sanctioned a licensee for offering one format over another. The only other reported cases arose in the late 1930's. The Commission denied three applications by the only applicants for their respective radio licenses because the applicants proposed to broadcast some of their schedules in "foreign languages" -- code for Yiddish, the language commonly used by Jewish refugees from Germany and Poland.

[n. 186 continued on p. 111]

crime was that it had changed its programming plans from the "general audience" schedule originally proposed in its licensing application -- a "character" violation. Faced with the probable loss of its license, the station dropped most of its Black programming, and the Commission quietly dropped the charges. That proved that the Commission's interest wasn't the licensee's "character" at all, which could hardly have been mitigated by "compliance" after a hearing was designated.

Two years later, in The Columbus Broadcasting Company, Inc., 40 FCC 641 (1965) ("Columbus"), the Commission was faced with a radio licensee who had used his station "to incite to riot...or to prevent by unlawful means, the implementation of a court order" requiring the University of Mississippi to enroll James Meredith. After President Kennedy federalized the National Guard in anticipation of violence on Mr. Meredith's fourth attempt to enroll, the radio station called upon its listeners to go to Oxford and assemble to prevent Mr. Meredith's enrollment. Hundreds answered the call, and two people died in the ensuing riot.

However, the Commission merely "admonished" the station, ignoring the obvious fact that broadcast licenses are not awarded

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186/ [continued from p. 110]

In Voice of Detroit, Inc., 6 FCC 363, 372-73 (1938), the Commission held that "the need for equitable distribution of [radio] facilities throughout the country is too great to grant broadcast station licenses for the purpose of rendering service to such a limited group...the emphasis placed by this applicant upon making available his facilities to restricted groups of the public does not indicate that the service of the proposed station would be in the public interest." See also Chicago Broadcasting Ass'n., 3 FCC 277, 280 (1936) and Voice of Brooklyn, 8 FCC 230, 248 (1940). Thus, under the Commission's pre-World War II jurisprudence, none but WASPs could hope for access to the public airwaves.

so they can be used to incite riots. Illustrating how out of step the Commission was with the federal government's civil rights policies of the day, the losing complainant in Columbus was none other than the Federal Bureau of Investigation, then headed by that great friend of civil rights, J. Edgar Hoover.

The federal courts soon lost patience with the Commission's racist policies. In UCC I, 359 F.2d at 994, the Court of Appeals ordered the Commission to hold a hearing on the license renewal of a Jackson, Mississippi station, WLBT-TV, which only broadcast the White Citizens Council's viewpoint on civil rights. WLBT-TV went so far as to censor the pioneering "CBS Evening News with Douglas Edwards" with a "Sorry, Cable Trouble" sign when NAACP General Counsel Thurgood Marshall was being interviewed. Id. at 998.

After an overwhelmingly one-sided hearing, the Commission renewed WLBT-TV's license again. On appeal again, the Court ordered the Commission to deny WLBT's license renewal. The Court had never before taken such an action, but this time it held the administrative record to be "beyond repair." UCC II, 425 F.2d at 550.187/

The Commission's new antidiscrimination policy -- imposed by the court in UCC II -- was applied haltingly and sporadically. In Chapman, 24 FCC2d at 282, the Commission had before it several applicants seeking construction permits to operate on Channel 21 in

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187/ See Bush and Martin, 48 Federal Comm. Law Journal at 439-440 n. 94 (noting that evidence in the record showed that the FCC was aware that the licensee had "engaged in a variety of discriminatory programming activities, including the refusal to permit the broadcasting of any viewpoints contrary to the station's own segregationist ideology"). The authors cite UCC II as an example of FCC conduct which might fall short of de jure discrimination, but which had the same effect.

Birmingham, Alabama. One applicant, Alabama Television, had as a 16.2% stockholder, John Jemison, who owned a Birmingham cemetery. Jemison had participated in the cemetery's 1954 decision to continue its policy, adopted in 1906, of excluding Blacks.

The cemetery's policy came to light when the cemetery turned away the body of a Black soldier killed in Vietnam. Yet the Commission found "extenuating circumstances" in the applicant's claim that the cemetery would have been sued by White cemetery plot owners.188/ Thus, the Commission ordered a hearing -- but framed the issues to focus only on why the applicant had covered the matter up, not whether a rabid segregationist had the moral character to be a federal licensee. Id. at 284. Even the cover-up allegations were thrown out by the Hearing Examiner, who held that "in today's climate it is not at all an oddity for political leadership to appear to buckle before irresponsible and only half true racism charges." Chapman Radio and Television Co., 21 RR2d 887, 895 (Kraushaar, Examiner, 1971).

Southland, discussed above, was one of the first television comparative hearings, and Chapman was among the last. Today, virtually all of the television spectrum in the United States has been handed out. Minority owned companies received exactly two of these free television licenses. In effect, the Commission presided over a 100% set-aside for Whites. That is why today's Commission,

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188/ Id. at 284. Twenty-two years earlier, the Supreme Court had ruled that restrictive covenants were unenforcable. Hurd v. Hodge, 334 U.S. 24 (1948) ("Hurd"). Hurd involved housing. Occupants of houses are typically more likely than occupants of cemeteries to be concerned about their neighbors' race. A fortiori, the Commission's holding in Chapman was ridiculous.

seeking to enable at least a few minorities to own stations, is compelled to focus on opportunities for minorities to buy their way in. See Market Entry Barriers, supra.

By the time the Commission adopted the EEO Rule, the ownership and management structure of the industry was firmly entrenched in the hands of White males, a condition which persists almost unchanged to this day.189/ This condition still prevents minorities and women from having access to the mentoring, training and career development opportunities which would allow them to

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189/ Even in its implementation of the EEO Rule, the Commission still continued to ratify and validate the discriminatory practices of its licensees. Although it is inconceivable that only three licensees discriminated in employment between 1969 and 1996, only three licensees have ever been the subject of findings that their discriminatory actions would justify the loss of their licenses. Only one license has actually been taken away because of (religious) discrimination, in King's Garden (MO&O), 34 FCC2d at 237. The development of the Commission's EEO jurisprudence has come largely as a result of court decisions, including Beaumont NAACP v. FCC, 854 F.2d 501 (D.C. Cir. 1988) ("Beaumont"); NBMC v. FCC, 775 F.2d 342 (D.C. Cir., 1985); Bilingual II, 595 F.2d at 621; Black Broadcasting Coalition of Richmond v. FCC, 556 F.2d 59 (D.C. Cir. 1977) ("BBC"), and UCC III, 560 F.2d at 529.

Beaumont, 854 F.2d at 501, provides a classic example of the Commission's behavior in handling EEO allegations. In 1981, Pyle Communications, which owned KIEZ(AM) and KWIC-FM in Beaumont, Texas, changed KIEZ's format from Black to country and western. Pyle then fired the Black members of the staff -- even the secretaries and salespeople -- without giving them a chance to try out in the new format. At first, Pyle told the Commission that the Black employees had left voluntarily. However, the NAACP used Pyle's own payroll records to show that every time a Black employee had "resigned", a White person had been hired that day or a day earlier to do the same job. Confronted with this evidence, Pyle changed its story, maintaining that the Black employees had been incompetent. Id. at 505. The Commission accepted Pyle's second version of the facts and refused to hold a hearing. The Court of Appeals had little difficulty reversing and remanding for trial, holding that Pyle's conflicting stories should have tipped off the Commission to possible race discrimination.

[n. 189 continued on p. 115]

189/ [continued from p. 114]

Another classic example of the Commission's difficulty in prosecuting discriminators involved a case which did result in a finding of intentional discrimination. The case involved 250 watt station WBUZ(AM) in Fredonia, New York. Catoctin, 4 FCC Rcd at 2553. Catoctin should have been a "no-brainer." In 1980, Henry Serafin, the owner of WBUZ(AM), asked the Buffalo CETA office to send over a secretarial applicant. CETA sent Linda Johnson. Although Ms. Johnson was well qualified, Serafin did not interview her. Instead, he called CETA counselor Cheryl Gawronski and asked "don't you have any white girls to send me?" adding that Ms. Johnson "would make charcoal look white." Id. at 2555. Yet the Commission inexplicably relied only on Serafin's misrepresentations at trial to deny renewal, holding that his discrimination against Ms. Johnson, and one other factor, "only reinforce the conclusion" that Catoctin was unqualified. The other factor which "reinforce[d]" that conclusion, and which the Commission apparently deemed to weigh the same as discrimination, was WBUZ's failure to award a $200 stereo receiver as a prize in a contest. It took four and a half years from the date of the discrimination for the case to be designated for hearing, and another four years before the license renewal was denied. Id. at 2557-58. The Commission evidently viewed employment discrimination to carry the same policy priority as the fraudulent award of a $200 radio.

Other examples abound. See, e.g., Rust Communications Group, Inc., 73 FCC2d 39 (1979), recon. denied, 75 FCC2d 445 (1980), aff'd sub nom. Metro-Act of Rochester, Inc. v. FCC, 670 F.2d 202 (1981) (renewing the licenses of stations which had characterized only certain types of jobs as "suitable" or "feasible" for minorities); WAVY-TV Television, Inc., 53 RR2d 655, 660 ¶9 (1983) (refusing even to hold a hearing on undisputed allegations that a Norfolk television station, inter alia, held its Christmas party at a segregated country club and told the Black employees that it was very sorry, they couldn't come); Banks Broadcasting Company, MM Docket No. 85-65, FCC 85-122 (released April 4, 1985) (refusing to hold a hearing on undisputed allegations that, even as they worked side by side with Whites at two Philadelphia radio stations, Blacks earned only 40% of the Whites' pay); The Lutheran Church-Missouri Synod (MO&O), 12 FCC2d 2154 (1996) (vacated on other grounds; subsequent history omitted) (renewing licenses of stations that had defended their failure to recruit Blacks by asserting that Blacks supposedly seldom listen to classical music, although the licensee routinely failed to apply this test to its white employees).

We take this opportunity to make an observation: the cases discussed above illustrate the meek, pro-discriminator bias the FCC applied for decades in "enforcing" an EEO rule which was later found by a federal court to be too aggressive. Given the FCC's history, it is no less than amazing that anyone would think that the FCC might apply the proposed, far less aggressive EEO rules in a manner which would discriminate against white males.

achieve their full potentials even if present-time intentional discrimination disappeared this afternoon.

Originally, EEO regulation was intended as part of the national policy to prevent and remedy racial discrimination,[190] a matter of the "highest priority." Franks v. Bowman Transportation Co., 424 U.S. 747, 763 (1976). Subsequently, the Commission forgot the importance of this policy.[191] In this proceeding, the Commission should restore remediation to its proper role as one of the significant goals of EEO regulation. In this way, the Commission can begin to repair the damage done by its own unfortunate history of encouragement, collaboration, and tangible rewards of spectrum to discriminators.

190/ Nondiscrimination - 1968, 13 FCC2d at 773-74 (holding that a "national policy" against employment discrimination justified the EEO rule.) See also Nondiscrimination - 1969, 18 FCC2d at 245.

191/ See Nondiscrimination in the Employment Practices of Broadcast Licensees, 60 FCC2d 226, 229 (1976) ("Nondiscrimination - 1976"), reversed on other grounds in UCC III, 560 F.2d at 529 ("[w]e do not contend that this agency has a sweeping mandate to further the 'national policy' against discrimination...."). However, in that same year, the Commission recognized "[a]n affirmative action concept is meaningless unless positive steps are taken to overcome the effects of past discrimination - however inadvertent." Federal, 59 FCC2d at 365. Thus, the Commission has never completely abandoned its appreciation for the fact that the EEO Rule is part of the mainstream of American antidiscrimination jurisprudence. Nor has Congress. See H.R. Conf. Rep. No. 765, 97th Cong., 2d Sess. 40, 43 (1982) ("the effects of past inequities stemming from racial and ethnic discrimination have resulted in a severe underrepresentation of minorities in the media of mass communications, as it has adversely affected their participation in other sectors of the economy as well.")

3. Does the FCC have discretion not to remedy the consequences of its own past discrimination?

We have shown that the Commission should adopt stronger EEO enforcement procedures to remedy the damage caused in significant part by its own past involvement in discrimination. See pp. 97-116 supra. In addition, as shown below, any evisceration of the only meaningful protections against discrimination in broadcasting would be unlawful. A race- and gender- neutral EEO rule -- the most minimalistic step conceivable which might remedy past discrimination, is essential to avoid a continuing violation of the equal protection and due process rights of minorities and women.192/

This conclusion inexorably flows from an understanding both of the history of broadcasting and the history of civil rights. As W.E.B. DuBois accurately predicted, the defining issue of the 20th Century was the "color line" -- the institutionalization of two societies, one White and one Black. Among the great triumphs of the 20th Century was the success of the civil rights organizations in petitioning the courts and federal agencies to break down a succession of barriers to equal opportunity, from the poll tax in the electoral sphere to broadcasters' failure to let minorities know when job vacancies arise.

192/ Federal equal protection violations are redressed through the Due Process Clause of the Fifth Amendment, whose scope is contiguous with the Equal Protection Clause of the Fourteenth Amendment. Bolling v. Sharpe, 347 U.S. 497 (1954) ("Bolling") (ordering desegregation of the D.C. public schools when D.C. was federally governed).

We venture to predict that the defining issue of the 21st Century will be the information line -- the institutionalization of two societies, one information-rich and one information-poor. To achieve the full democratization of information flow, the courts and federal agencies must next break down a succcession of barriers to diversity of voices -- from the absence of a well-funded e-rate to bring the Internet to all public schools and libraries, to the remediation of the effects of generations of segregation in broadcasting over which the FCC has presided.

The NPRM correctly recognizes that the EEO Rule does not diminish the equal protection or due process rights of White males because it is an efforts-based initiative that does not mandate that broadcasters hire on the basis of race or gender. Id., 13 FCC Rcd at 23011-14 ¶¶18-25; see pp. 55-86 supra.[193/] In addition, the

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193/ This is a peculiar subject for serious debate, since:

- Every chief executive officer of every leading television network, radio network, cable MSO, station group, film studio, satellite company, broadcast tower company, syndication, TV and radio production or distribution company, music recording or distribution company, tower company, audience rating company, major advertiser or broadcast industry trade publication is a White male.
- Minorities do not own a significant share of any of these corporations.
- Each of the first twenty-three chairs of the FCC was a White male. Fifty-six of the 71 members of the FCC have been White males.
- Every person who has ever headed the Commerce Committee or Communications Subcommittee of either the House or the Senate has been a White male.

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Commission should expressly recognize that an end to meaningful efforts by the FCC to remedy the consequences of its own past discrimination-ratifying behavior would directly offend the Due Process Clause of the Fifth Amendment, which operates congruently with the Equal Protection Clause of the Fourteenth Amendment. See n. 192 supra.

At the outset, we must articulate precisely the nature of the right being curtailed by government action.194/ The right being curtailed is access to meaningful participation in the stream of mass communications, both as creators and consumers. This right entitles groups, whose members have been targeted for discrimination because of their membership in the group, to enjoy the same opportunities as other groups enjoy to create, transmit

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193/ [continued from p. 118]

- All but three of the Washington lobbyists for the major communications companies are White males.
- To the best of our knowledge, all of the approximately 150 full service media brokers in the United States is white (except MMTC, which is an organization), and only three or four are women.
- White males run every major broadcast talent placement firm.
- White males run every major communications law firm, and run every mid-sized communications law firm but two.
- White males control every major financial institution lending money for major media acquisitions and transactions. With one possible exception, every person who can greenlight an eight figure broadcast deal is a White male.

194/ Railway Express Agency v. New York, 356 U.S. 106, 110 (1947) (dicussing procedure for analyzing equal protection and due process claims).

and interact[195] with mass-distributed information, cultural content,[196] and opinion. We refer to this right by the shorthand term "the Media Participation Right."

The Media Participation Right is expansively defined to accurately reflect the ways in which consumers employ media in

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195/ The interactive nature of mass communications was recognized in Waters Broadcasting Corp., 91 FCC2d 1260 (1982) ("Waters"), aff'd sub nom. West Michigan Broadcasting Co. v. FCC, 735 F.2d 601 (1984), cert. denied, 470 U.S. 1027 (1984). In Waters, the Commission awarded a decisionally significant minority enhancement to the ownership integration proposal of a Black woman who proposed to serve a nearly all-White community. The Commission held that "minority controlled stations are likely to serve the important function of providing a different insight to the general public about minority problems and minority views on matters of concern to the entire community and the nation." Id. at 1265. Thus, Waters validated the fact that communication between minorities and nonminorities, rather than just communication within a minority group, is an essential aspect of the diversity-promoting goal of the comparative hearing process. See also Dr. Martin Luther King Movement v. Chicago, 419 F.Supp. 667 (N.D. Ill. 1976) (emphasizing that Blacks' need for access to a White audience requires a municipality to permit a civil rights march in a White neighborhood).

196/ It is essential that cultural content be included with the scope of equal protection and due process in the media. Although the Commission's diversity jurisprudence has focused largely on informational, public affairs and instructional content, (see, e.g., NAACP v. FPC, 425 U.S. at 670 n. 7 and Deregulation of Radio, 84 FCC2d at 975) it is cultural broadcast content which most influences and mediates social norms. The inclusion of culture among the elements of media content affecting due process or equal protection rights may be analogized to the inclusion of cultural (as well as athletic) activities in the scope of educational opportunities covered by desegregation decrees. Brown I held that education is "a principal instrument in awakening the child to cultural values." Id., 347 U.S. at 493. Courts have not wavered in requiring the integration of school bands and orchestras, sporting events and extracurricular clubs. See, e.g., Davis v. Board of School Commissioners of Mobile County, 393 F.2d 690, 696 (5th Cir. 1968) (declaring that failure to schedule games between all-Black teams against all-White teams "is no longer tolerable; the integration of activities must be complete.") Similarly, the Commission should not waver in including culture within the scope of content triggering due process or equal protection rights in the media.

their daily lives: as participants in the creation and transmission of content, as recipients of that content, and as respondents to that content.

The Media Participation Right is broader in scope than the "Access Right" which formed the basis for the Fairness Doctrine. The Fairness Doctrine focused only on the role of consumers as respondents to content.197/ The Media Participation Right also includes consumers' role as creators and transmitters of content.

However, the Media Participation Right is easier to enforce than the Access Right. The Fairness Doctrine was meant to be applied microscopically, on a station by station or issue by issue basis.198/ The Media Participation Right applies macroscopically, implicating structural questions (who can own the media) and operational questions (hiring policies). The Media Participation Right is based upon the nexus between ownership structure or hiring

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197/ See Syracuse Peace Council v. FCC, 867 F.2d 654 (D.C. Cir.), cert. denied, 493 U.S. 1019 (1989).

198/ Id. The Fairness Doctrine was repealed because the FCC accepted many broadcasters' contention that a potential compulsion to air particular viewpoints chills a broadcaster's exercise of her First Amendment speech rights. See Report Concerning General Fairness Doctrine Obligations of Broadcast Licensees, 102 FCC2d 143, 161 (1985) (finding that "in net effect" the Fairness Doctrine "often discourages the presentation of controversial issue programming"); Complaint of Syracuse Peace Council, 2 FCC Rcd 5043, 5057-58 (1987) (holding that the "Fairness Doctrine contravenes the First Amendment" and is therefore unenforceable against station); Fairness Report, 2 FCC Rcd 5272, 5295 (1987) (reaffirming decision to repeal Fairness Doctrine, finding that it "contravenes fundamental principles of free speech.")

policies and the diversity of viewpoints[199] -- a nexus which takes the form of a general inference that marketwide ownership or employment integration will enhance marketwide viewpoint diversity, rather than a specific finding that the integration of employment or ownership of any one broadcast station would inevitably enhance diversity of viewpoints at that station.[200] Thus, the Media Participation Right would never be applied to demand that a particular broadcaster transmit or abstain from transmitting any particular item of content,[201] or to instruct a broadcaster to hire a particular person.[202]

The differences between the Access Right and the Media Participation Right are found in the constitutional provisions they are meant to effectuate. If there is a right of access, it flows directly from the First Amendment.[203] On the other hand, the Media Participation Right flows from the Due Process Clause of the

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199/ NAACP v. FPC, 425 U.S. at 670 n. 7 (finding a nexus between EEO and diversity of viewpoints); Metro Broadcasting, Inc. v. FCC, 497 U.S. 547, 563 (1990) ("Metro Broadcasting") (finding a nexus between minority ownership and diversity of viewpoints). Although Adarand overruled the aspect of Metro Broadcasting which would apply intermediate scrutiny to race-based policies, Adarand left untouched Metro Broadcasting's finding of a nexus between minority ownership and viewpoint diversity.

200/ Metro Broadcasting, 497 U.S. at 566; see NAACP v. FPC, supra, 425 U.S. at 670 n. 7.

201/ See Metro Broadcasting, 497 U.S. at 566.

202/ See FCC/EEOC Agreement, 70 FCC2d at 2331-32.

203/ Red Lion, 395 U.S. at 390.

Fifth Amendment (congruent with the Fourteenth Amendment's Equal Protection Clause).204/

The Media Participation Right is closely analogous to the interests which led the Supreme Court to declare that the government has an affirmative, nondiscretionary duty to bring about the integration of the nation's public schools. Brown I, 347 U.S. at 493.205/ Like the need to eliminate school segregation, the need to eliminate all vestiges of a previously segregated system of broadcasting is a compelling interest requiring federal remedial action.

204/ The Courts have not recognized a right of access to broadcasting under the First Amendment. Smothers v. CBS, 351 F.Supp. 622 (C.D. Ca. 1972); see Columbia Broadcasting System, Inc. v. Democratic National Committee, 412 U.S. 94 (1973); cf. Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974). This lack of recognition of a right of access does not implicate the Media Participation Right, which flows not from the First Amendment but from the Due Process Clause of the Fifth Amendment, as enhanced by the First Amendment's goal of a robust exchange of ideas. Moreover, the Courts have long recognized that broadcast regulation should advance this First Amendment goal. NBC v. United States, supra. That principle exists independently of whether there is an individual right of access under the First Amendment.

205/ It can be argued that our voting rights jurisprudence provides an even closer analogy to the Media Participation Right than does school desegregation. However, we will never know, because history didn't cooperate. School desegregation came about through a direct confrontation in the courts over the Equal Protection Clause of the Fourteenth Amendment (Brown I) and the Due Process Clause of the Fifth Amendment (Bolling). The critical issues in that confrontation were litigated by the federal courts in a cornucopia of equal protection decisions between 1954 and 1964, when Title VI of the Civil Rights Act gave the Department of Health, Education and Welfare the power to withhold financial assistance from segregated school districts. Thereafter, the federal courts' role became focused largely on statutory interpretation. On the other hand, virtually all of our voting rights jurisprudence flows directly from the Voting Rights Act of 1965. Promptly after its enactment, that statute held to be, inter alia, appropriate legislation to enforce the Equal Protection Clause. Katzenbach v. Morgan, 384 U.S. 641 (1966). Thereafter, most voting rights litigation has focused on nonconstitutional, statutory issues.

Our media play at least as critical a role in the socialization and development of our children as do the schools.206/ Like education, the media is essential to the attainment or enjoyment of every element of civilized life in a modern democracy, including housing, health care, defense of one's civil liberties, and informed participation in the political process.207/ What school desegregation jurisprudence tells us about the importance of public education can also be said about the free broadcast media today: (1) it has traditionally been recognized as vital to the "preservation of a democratic system of government,"208/ and (2) it is necesssary to prepare individuals to be self-reliant and self-sufficient participants in society.209/

Moreover, the free broadcast media in particular, like public education, serves an essential public function210/ dependent on

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206/ See Children's Television Act of 1989, Senate Committee on Commerce, Science, and Transportation, S. Rep. No. 227, 101st Cong., 1st Sess. 10-18 (1989) ("Children's Television Act Senate Report").

207/ Blue Book (Federal Communications Commission, 1944) at 4.

208/ Brown I, 347 U.S. at 493; see Abington Sch. Dist. v. Schempp, 374 U.S. 203, 230 (1963) (Brennan, J., concurring).

209/ Brown I, 347 U.S. at 493.

210/ Nobody seriously contends that the nation could survive long without broadcasting -- specifically, free broadcasting. Over-the-air broadcasting, including both television and radio network, local and syndicated programming, has by far the greatest impact upon our society's educational, cultural and political development when compared to all other media outlets, because most people rely upon such programming as their primary source for information and entertainment. In fact, our system of product and service marketing, and our culture, are entirely dependent upon it. More important, our political system depends on it: Section 315 of the Communications Act presumes the existence of free broadcasting

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government for its existence.[211] Just as the presence of schools some may attend for a fee does not relieve the government of its duty to cause the integration of the ubiquitous free public schools,[212] the presence of media that some may purchase for a fee

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210/ [continued from p. 124]

as a critical component of the democratic system. Red Lion, 395 U.S. at 389. Thus, when the federal government was shut down in January, 1996, leaving only "essential" (e.g. National Security) employees on the job, the Mass Media Bureau was expected to maintain a skeleton staff to ensure that the nation's broadcasting infrastructure would continue to operate.

211/ Zenith, supra. In adopting the EEO Rule, the Commission noted that "it has been argued that because of the relationship between the government and broadcasting stations, 'the Commission has a constitutional duty to assure equal employment opportunity.'" Nondiscrimination - 1969, 18 FCC2d at 241. The Commission identified Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961) ("Burton") as a citation which had been given in support of that proposition. Id. at n. 2.

The party which had made this argument in 1969 was none other than the Department of Justice. Citing Burton, the Department argued that "the use of the public domain would appear to confer upon broadcast licensees enough of a 'public' character to permit the Commission to require the licensee to follow the constitutionally grounded obligation not to discrimination on the grounds of race, color, or national origin." Letter to Hon. Rosel Hyde from Stephen J. Pollak, Assistant Attorney General, Civil Rights Division, May 21, 1968, found in Nondiscrimination - 1968, 13 FCC2d at 776. The Department was absolutely correct. Indeed, the case for federal enforcement of due process or equal protection rights in broadcasting is even stronger than the case for enforcement of those rights in Burton. Burton involved a luncheonette which (owing to its location in a municipal building) could not have existed absent state action, but which was not essential to the performance of the state's functions. Free broadcasting cannot exist absent state action (Zenith Radio) and it is essential to the performance of the state's functions (see n. 210 supra).

212/ Griffin v. Prince Edward County Board of Education, 377 U.S. 218 (1964) (rejecting school board's plan to close the public schools to avoid compliance with school desegregation decree). See also Poindexter v. Louisiana Financial Commission, 274 F.Supp. 833 (E.D. La. 1967), aff'd per curiam, 389 U.S. 571 (1968) (rejecting state's plan to finance private schools to avoid school desegregation decree).

does not relieve the government of its duty to cause the integration of the ubiquitous free media.213/

The FCC's role as the champion and protector of Fifth Amendment Due Process rights may be found in the Communications Act's command that broadcasting be made available "to all the people of the United States," 47 U.S.C. §151 (1934) (emphasis supplied), a directive recently amended by the Telecommunications Act's command that broadcasting be made available "without discrimination on the basis of race, color, national origin, religion or sex", 47 U.S.C. §151 (1996). The FCC's Fifth Amendment remedial powers may also be traced to Section 303(g) of the Communications Act, which requires the Commission to provide for the "larger and more effective use of radio in the public interest."

Just as the Brown I court imposed affirmative remedial duties on government because it found education to be nearly a fundamental right,214/ the Commission today must accept affirmative remedial

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213/ See FCC v. NCCB, 436 U.S. 795 (1978) (commenting that the existence of cable, newspapers, and the like does not remove the need for the FCC to supervise the ownership structure of the broadcasting industry).

This analysis might lead some to infer that FCC EEO regulation of cable is discretionary, rather than compulsory under the Due Process Clause of the Fifth Amendment. However, cable is so ubiquitous as a means of transmitting free media that an equal protection-driven policy applicable to free media must apply to cable as well. See Turner Broadcasting System, Inc. v. FCC, 512 U.S. 1278 (1994) ("Turner I"). This is only a theoretical question, inasmuch as FCC EEO regulation of cable is not discretionary because Congress insisted upon it in the Cable Act of 1992. 47 U.S.C. §634 (1992).

214/ Brown I did not hold that education is a "fundamental" right, but it came close. Id. at 493 (education is "the very foundation of good citizenship"). The near-fundamental nature of education is manifest from the existence of compulsory education laws in every state. Id.